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Review of *Caring Autonomy: European Human Rights Law and the Challenge of Individualism*

KATRI LÖHMUS, Cambridge University Press, 2015, hardback, 246 pp., £72, ISBN 978-1-107-08177-2

Shawn HE Harmon, Edinburgh Law School, University of Edinburgh, Edinburgh, Scotland,
shawn.harmon@ed.ac.uk

In *Caring Autonomy: European Human Rights Law and the Challenge of Individualism*, Katri Lõhmus examines in detail the unfolding autonomy-grounded jurisprudence of the European Court of Human Rights (ECtHR) in an effort to demonstrate that it has adopted a particular, and particularly troubling, conception of autonomy. Focusing on the ECtHR's Article 8 (private life) cases, and specifically medical and reproductive cases, she posits that the ECtHR's interpretation belies an impoverished view of the human condition, and that it is inappropriate for regulating choice and decision-making in the modern, interpersonal (and necessarily co-dependent) social setting (p. 11). Given the prevailing context of uncertainty, insecurity, mobility, and mutual reliance, Lõhmus argues that the ECtHR should have adopted an alternative vision of autonomy, which she describes as 'caring autonomy'. Closely related to the feminist and communitarian concepts of relational autonomy, which understands autonomy in the context of social relations and interdependence, she defines caring autonomy as similarly sensitive to relations and interdependence but as engaging more directly with the ethic of care, the fulfilment of responsibilities demanded by certain relationships, and the interaction of vulnerability and trust, all of which demands a richer view of the human condition than we typically adopt in our jurisprudence (pp. 43 and 213-214). She goes on to defend her thesis in a well-structured, well-reasoned, and compelling argument.

In Chapter 1, 'Choosing Autonomy', Lõhmus presents three understandings of autonomy – caring autonomy, principled autonomy, and individual autonomy – each of which gives rise to different considerations and entitlements, and each of which has been placed before the ECtHR in its recent jurisprudence. For an example of caring autonomy being clearly implicated but largely overlooked, she offers *Johansen v Norway*,¹ a case in which a mother unsuccessfully challenged the authorities' decision to take her daughter into care. *Laskey, Jaggard & Brown v UK*,² a case in which convictions for private and consensual acts of sadomasochism were overturned, is offered as a case wherein principled autonomy was raised and rejected by the ECtHR, the majority eschewing an understanding of autonomy whereby decisions must be taken in accordance with community-adopted standards of rationality and morality (for example, dignity). For an example of individual autonomy explicitly being articulated, though not vindicated to the benefit of the applicant, she offers *Pretty v UK*.³ In that case, and for the first time, the ECtHR accepted that the self-determination rights contained in Article 8 stand firmly on the notion of personal autonomy, being the right to make personal choices for oneself.⁴ However, in Chapter 3, Lõhmus argues that the weight of recent cases demonstrates that the ECtHR has settled on the uniquely atomistic individual autonomy, which sees the person as largely detached, independent, and

¹ (1996) 23 EHRR 33.

² (1997) 24 EHRR 39.

³ (2002) 35 EHRR 1.

⁴ *Ibid*, paras. 61-66.

in control. And here she relies on the reproduction cases of *Dickson v UK*,⁵ *Evans v UK*,⁶ and *SH v Austria*.⁷

In Chapter 2,⁸ Löhmus argues that, while the individualistic interpretation was not inevitable, it was certainly favoured by some of the interpretive approaches that the ECtHR is generally bound to apply, most specifically those of purposiveness,⁹ dynamism,¹⁰ and comparativeness.¹¹ She concludes that:

Considering the adoption of individual autonomy in the light of dynamic interpretation, comparative interpretation, and [purposive] interpretation ... I find that the inclusion of the concept ... has proceeded in an uncritical and potentially misconceived manner. Moreover, nothing in the Convention prescribes individual autonomy as the most suitable model to underlie the interpretation of Article 8 guarantees. (p. 77)

As noted above, in Chapter 3, Löhmus demonstrates how individual autonomy is problematic, in part because it takes insufficient notice of our relational context.¹² She furthers this claim in Chapter 4, by drawing on social science literature to exemplify our social embeddedness and the myth of ‘splendid isolation’ from a relational perspective.¹³ In Chapter 5, she shows how autonomy is necessarily reliant on trust and that trust is central to the law, but that individual autonomy tends to undermine rather than advance or encourage trust.¹⁴ Finally, in Chapter 6, Löhmus claims that, in order to promote trust *and trustworthiness*, the ECtHR should adopt the language of caring autonomy as informed by care ethics.¹⁵ She defends this as follows:

[F]or trust to outweigh distrust, our beliefs, attitudes or expectations concerning the probability that others’ actions will not harm us or will serve our interests need to be mostly optimistic. Following Hall, trust is the optimistic acceptance of a vulnerable situation in which the truster believes the trustee will care for the truster’s interests. Trust, in other words, is based on positive expectations that another person behaves in a responsible and caring way, and will continue to do so. Behaving in a caring way helps to build trust and mutual concern and connectedness between persons. In order to cultivate trust, we need to cultivate caring. (pp. 181-182)

⁵ (2007) 44 EHRR 21.

⁶ (2008) 46 EHRR 34.

⁷ (2011) 52 EHRR 6.

⁸ ‘What Informs the ECtHR? The Origins of the Concept of Individual Autonomy’.

⁹ This is imposed by the Vienna Convention on the Law of Treaties (1969).

¹⁰ Prevalent in constitutional law settings, and accepted as necessary to keep enduring legal instruments relevant, this reflects the idea that the ECHR must be a ‘living tree’ that reflects evolving social circumstances and mores, and it was accepted in *Tyrer v UK* (1978) 2 EHRR 1, and consistently reiterated ever since.

¹¹ This means that a principle’s animating force can come from domestic laws and contexts, and the ECHR must be interpreted allowing for a margin of appreciation (i.e., giving domestic authorities the space to apply their laws in ways sensitive to their particular cultural environments). This idea originated from a 1958 report of the Commission and has been entrenched by subsequent Commission decisions and over 700 ECtHR judgments: S Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Council of Europe, 2000).

¹² ‘Expressions of Individual Autonomy’.

¹³ ‘Autonomy, Individualisation and the Emergence of the Problem of Trust’.

¹⁴ ‘Autonomy, Law and Trust’.

¹⁵ ‘Caring Autonomy’.

A commitment to individual autonomy, Löhmus argues, does nothing to cultivate caring, and so undermines trust and the founding (and support) of positive interpersonal relationships. Having applied an ethic of care to autonomy, she revisits the *Pretty* case, concluding that, while it would not (in her estimation) have led to a different outcome, an approach grounded in caring autonomy would have resulted in a much deeper and contextual engagement with the circumstances *and other interested parties* of the case. The notion of caring autonomy that Löhmus arrives at has clear overlaps with notions of solidarity, a widely cited value, at least rhetorically, but one that has remained under-operationalised.¹⁶ As such, I would have liked to have seen a stronger acknowledgement of, and exploration of the links to, solidarity in her work.

Having arrived at the above (startling?) conclusion with respect to *Pretty*, one might ask what the value of Löhmus' alternative approach is – what is its potential significance? This lies in one strand of Löhmus' argument, a strand that I believe is absolutely critical, but underdeveloped in the book, namely her insistence that the law and courts have an important 'expressive function', one that grows in importance as courts grow in authority and prestige (pp. 2-3). Essentially, Löhmus grounds her work on the idea that rights jurisprudence matters, not only to the litigants in the dispute, but to society more broadly. Rights jurisprudence, through its expressiveness, is a core shaper of social expectations and behaviours, and this is as it should be. Thus, we ought to care about this and other courts' conceptions of rights and their underlying values because the decisions through which they operationalise these rights and values shape, in profound ways, both the foundations on which we base, and the boundaries by which we limit, our social interactions. They do this for the parties before them in very direct/explicit ways, and for many others across society in sometimes more subtle ways.

It is this idea which prompts Löhmus to emphasise, in Chapter 6, the importance of the language adopted by the ECtHR and the moral landscape from which it draws. If this is *not* the current reality of rights jurisprudence, then the pertinence of Löhmus' work is powerfully undermined. While I believe that she is absolutely correct, and that her overall project is therefore valid and important, I also believe that she might have profitably defended this foundational proposition in greater detail. It warranted rather more initial exploration than the four pages dedicated to it (pp. 2-6). In those pages, Löhmus observes that jurists, especially, apparently, those on the ECtHR, too often seek to distance themselves and their remit from the broader social and moral milieu. They claim that it is not their role to encourage or engineer social or moral change, and they imagine that their judgments are somehow divorced from socio-political matters and movements (p. 2). She demonstrates this proclivity with reference to Laurence Helfer¹⁷ and Luzius Wildhaber,¹⁸ the latter a former President of the ECtHR.

My desire to have been given more by Löhmus stems from the fact that this position is not necessarily a fringe one. While the normalisation of rights-based jurisprudence is probably eroding it and reducing its number of adherents, there still exists jurists and court observers

¹⁶ S Harmon, 'From Engagement to Re-Engagement: The Expression of Moral Values in Patenting Proceedings, Present and Future' (2006) 31 *European Law Rev* 642-666; S Harmon, 'Solidarity: A (New) Ethic for Global Health Policy' (2006) 14 *Health Care Analysis* 215-236; S Harmon, 'Ethical Rhetoric: Genomics and the Moral Content of UNESCO's 'Universal' Declarations' (2008) 34 *J Med Ethics* e24.

¹⁷ L Helfer, 'Consensus, Coherence and the European Convention on Human Rights' (1993) 26 *Cornell Int Law J* 133.

¹⁸ L Wildhaber, 'The European Court of Human Rights in Action' (2004) 21 *Ritsumeikan Law Rev* 83.

who share the view that courts are and should be extremely circumspect in their approach to decisions. Some, for example, labour under the notion that the law, as a social institution, is so impoverished, or ought to be, that its expressions carry little normative effect beyond the parties at bar. This position, which exemplifies the early rights jurisprudence of many supreme and constitutional courts, may be the natural consequence of the ‘traditional view’ of courts as rule-enforcers in static and largely subservient relationships with other administrative bodies.¹⁹ The techniques that have been devised by courts to avoid acting or expressing views in certain disputes, including standing, mootness and ripeness, have also been noted.²⁰ Perhaps in an effort to preserve their judicial independence and privileges, or perhaps as a misapprehension of their authority and significance in the modern world, these jurists deny that their elaborations impose particular moral choices and opportunities on the polity. Whatever their motivations and justifications, I think it behoved Lōhmus to more robustly defend her cornerstone position that courts are bodies that powerfully convey and promote certain socially valued (or at least socially influential) attitudes, norms and mores, helping to constitute society in the process.

She might have argued, in a more sustained manner, that the state and its various constituent entities constitute the law and are constituted by the law, and that the law is a diversely manifested (and unique) social institution which is intimately connected to, and dependent on, organisations, but which also shapes, empowers, and limits those organisations. What sets the law apart from many other social institutions is the combination of its normative and positive characters. It does not just explicitly structure behaviours and decisions through the imposition of non-negotiable limits and instructions, although it certainly does do this. It also makes apparent value judgements about the utility and/or virtue of possible courses, institutions, and positions, and these expressions travel widely and influence behaviour in all kinds of ways, both anticipated and unexpected. Importantly, and of relevance for Lōhmus, *courts* have a central role in that function. Courts do not just delimit behaviours and decisions through the imposition of instructions, although they certainly do this. They also subtly, over time, through their textual and oral expressions, and through their interpretation of social/cultural trajectories (or their filtering of conflicts through the culturally-influenced sieves that are doctrines and legal tests), influence behaviours, decisions, and those same social/cultural trajectories.²¹

As noted above, this expressive role, and this wider social relevance/influence, was not always the accepted wisdom. This can more readily be appreciated if one adopts a sufficiently longitudinal view. By way of example, one might consider the Supreme Court of Canada, a constitutional court influenced in no small part by the ECtHR. Peter McCormick’s detailed analysis of that Court demonstrates the gradual increase of, and both the resistance to and acceptance of, the socio-political and moral nature of court decisions as we moved toward a more rights-based society, and as courts became more strongly rights-interpreting institutions.²² Summarising his historical review, McCormick says:

¹⁹ J Scott and S Sturm, ‘Courts as Catalysts: Re-Thinking the Judicial Role in New Governance’ (2006) 13 Columbia J European Law 565.

²⁰ H Hershkoff, ‘State Courts and the “Passive Virtues”: Rethinking the Judicial Function’ (2001) 114 Harvard Law Rev 1833.

²¹ For more on this role of courts and jurisprudence see, for eg., N MacCormick and O Weinberger, *An Institutional Theory of Law: New Approaches to Legal Positivism* (Lancaster: Reidel Publishing, 1986); R Cotterrell, *The Sociology of Law*, 2d ed. (Oxford: OUP, 1992); N MacCormick, *Institutions of Law* (Oxford: OUP, 2007).

²² P McCormick, *Supreme At Last: The Evolution of the Supreme Court of Canada* (Toronto: James Lorimer & Co., 2000).

Fifty years ago, the Supreme Court of Canada was a minor blip on the Canadian political scene, a small and undistinguished body that limited itself to giving short, technical (and to laypeople virtually unreadable) decisions. The 1950s and 1960s saw flickering moments of promise but little in the way of substantial change; the 1970s – the Laskin years – transformed the court on almost every front; and the 1980s and 1990s (finally) saw the Supreme Court fill its long anticipated position near the centre of the stage of Canadian public life, largely because of its role in interpreting the Canadian Charter of Rights and Freedoms.²³

McCormick observes that the Court's litigants have changed, its caseload has changed, its functioning has changed, and its readiness to intervene has changed.²⁴

In parallel with the changes observed by McCormick, which are by no means restricted to the Canadian context,²⁵ greater scholarship has been directed at the role, power, responsibilities, and responsiveness of courts, including in relation to culture and to their reflecting/leading/teaching, and so expressive, functions. On this, Joanne Scott and Susan Sturm state that:

Many problems of public concern result from social practices and the dynamic interaction between culture, cognition, and context. Their remediation cannot be reduced to ... rule violation. They involve a combination of scientific and political judgment. Reflective, participatory deliberation, evaluated in relation to benchmarks of participation, epistemic adequacy, transparency, impartiality, and principled decision-making, can be better suited than detached logical consideration for producing the situated knowledge needed to determine the normative significance of complex or novel problems, as well as how they can be remedied. The legitimacy and efficacy of normative elaboration may well depend upon the interaction of multiple decision making bodies, using different forms of normative elaboration, which are accountable to each other.²⁶

They conclude that courts, especially those in the European context, can and should serve as a site for increasing transparency about experiments in governance, and for fostering cross-domain learning in this respect. Neil Siegel also expounds on the importance of 'judicial statesmanship', which encompasses the idea that, in addition to transparency and consistency, courts must attend to *expressing* social conditions and values as they change, and to moving the law accordingly.²⁷ Obviously, this imposes on courts obligations not only to be sensitive to the needs of the cases before them, but also to be intellectually honest and value-transparent.

On this point, it should be acknowledged that courts' expressions (and holdings) are undeniably influenced by social movements and pressures, and by the personal experiences of the judges. That being the case, judges should not too strongly deny their agency in

²³ *Ibid*, 4.

²⁴ In this regard, note the rising importance of amicus curiae interventions: R Roesch and other, 'Social Science and the Courts: The Role of Amicus Curiae Briefs' (1991) 15 *Law & Human Behavior* 1-11.

²⁵ In this regard, one might consider the reasons for the adoption of the doctrine of 'margin of appreciation' by the ECtHR, and that principle's development over time.

²⁶ Scott and Sturm, n 19 above, 570.

²⁷ N Siegel, 'The Virtue of Judicial Statesmanship' (2007) 86 *Tex. Law Rev* 1032.

decision-making, nor too loudly proclaim their objectivity or neutrality, nor overstate their limitations in applying or revising established doctrine. In his work on the US Supreme Court during the New Deal period, Arthur Schlesinger observed that the (celebrated) Black-Douglas camp viewed legal reasoning as malleable, rather than scientific.²⁸ It saw legal artifice, precedent ambiguity, and choice of doctrine as so extensive that courts could often come out on either side of an issue without ‘straining the fabric of legal logic’.²⁹ This demonstrates that there are often no unassailable right answers. Judges must acknowledge that political choice is inevitable, and they ought to make no pretence toward pure objectivity.³⁰

All of this is in keeping with the view expressed by Aharon Barak that the primary concern of supreme courts is not to correct the mistakes of lower judgments, but rather to concern themselves with broader, system-wide corrective action which bridges the gap between law and society.³¹

The law regulates relationships between people. It prescribes patterns of behavior. It reflects the values of society. The role of the judge is to understand the purpose of law in society and to help the law achieve its purpose. But the law of a society is a living organism. It is based on a given factual and social reality that is constantly changing. Sometimes the change is drastic, sudden, and easily identifiable. Sometimes [it] is minor and gradual, and cannot be noticed without the proper distance and perspective. Law’s connection to this fluid reality implies that it too is always changing. Sometimes change in law precedes societal change and is even intended to stimulate it. ... The judge is the primary actor in effecting this change.³²

In short, it is incumbent on courts to place their decisions in the broader social context and to be aware of that context *and its needs* when formulating their judgments. In doing so, they must strive to determine and protect the integrity of the balance between rights and limitations.³³ And, of course, they should eschew taking an overly narrow view of their authority and capacity to intervene; they must not neglect to exercise their power or lightly defer their responsibility to others.³⁴ This is especially important when a court is called upon to vindicate rights and redress imbalances and injustices.

Cass Sunstein generally concurs. He explicitly describes courts as ‘expressionist institutions’ whose decisions often and properly go beyond telling specific parties how they must behave.³⁵ Decisions should extend to making statements about social or political issues,

²⁸ A Schlesinger Jr., ‘The Supreme Court: 1947’, *Fortune Magazine*, vol. 35, January 1947, 201.

²⁹ *Ibid.*

³⁰ *Ibid.* For a thorough exploration of judicial activism and conservatism, see K Kmiec, ‘The Origin and Current Meanings of “Judicial Activism”’ (2004) 92 *California Law Rev* 1441.

³¹ A Barak, ‘A Judge on Judging: The Role of a Supreme Court in a Democracy’ (2002-2003) 119 *Harvard Law Rev* 19, 27-28. See also B Laskin, ‘The Role and Functions of Final Appellate Courts: The Supreme Court of Canada’ (1975) 53 *Can Bar Rev* 469; W Rehnquist, ‘The Changing Role of the Supreme Court’ (1986) 14 *FSU Law Rev* 1.

³² Barak, *ibid.*, 28-29, citing B Cardozo, *The Paradoxes of Legal Science* (NY: Columbia U Press, 1930), J Stone, *Legal System and Lawyers’ Reasoning* (Stanford: Stanford U Press, 1968), and B Dickson, ‘A Life in the Law: The Process of Judging’ (2000) 63 *Sask Law Rev* 373.

³³ Barak, *ibid.*, 44.

³⁴ For more on the consideration of activism and restraint as a factor in judicial appointment in the context of the ECtHR, see E Voeten, ‘The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights’ (2007) 61 *International Organization* 669.

³⁵ C Sunstein, ‘On the Expressive Function of Law’ (1996) 144 *U Penn Law Rev* 2021, 2025-2029.

many of which have profound moral implications.³⁶ Jason Mazzone offers an example, noting that cases on physician-assisted suicide have generated widespread interest and debate that stretch far beyond the specific issues implicated by the cases themselves.³⁷ He argues that this expressive function may be the most significant function that courts perform. And the more influential the court, the more justifiable are our heightened expectations of both its value-transparency and its expressive functions.

With respect to the ECtHR, Löhmus argues for a relatively recent achievement of influence, authority, and prestige (pp. 3-4). She thereby aligns herself with claims that the ECtHR is a success story of rights protection, upholding a European value system,³⁸ and her list of new rights entitlements founded by the ECtHR could be held up as emblematic of this success:

With the inclusion of the notion of personal autonomy as ‘an important principle underlying the interpretation of its [Article 8] guarantees’, the influx of new rights under Article 8 case law has been especially active. In addition to admitting such arguably quite ambiguous rights ... we can now identify a more concrete set of rights derived from case law. Among others, the Court has explicitly named the following: a right to respect for the decision to become a parent in a genetic sense; the right of a couple to conceive a child; the right to choose the circumstances of becoming a parent; a right to choice in matters of child delivery; rights of the parents and children to be together in a family environment; right to the protection of one’s image; the right to decide on the continuation of pregnancy; and the right to obtain available information on one’s health condition. What this growing list of new rights demonstrates is that ... the Court has caused a more substantial shift in the understanding of what the protection of ‘private life’ entails: Article 8 demands not just protection from the state’s interference in what was understood as one’s private sphere, but to protect an individual’s freedom to choose the course of his or her own life. (p. 49)

Parenthetically, the rationality of finding and upholding some of these individualistic and procreative rights in a (global) social context that is already characterised by severe overpopulation and over-consumption might be worthy of some reasoned debate. Even if some of them could be supported by the notion of caring autonomy as an alternative to individualist autonomy, their justifiability might be questioned.

In any event, the very existence of this rights cascade together with the apparently un-reflexive adoption of a misconceived concept of autonomy, at least as far as Löhmus is concerned, and with her I concur, also speaks to the need for in-depth analyses of the ECtHR’s (and other courts’) composition, disposition, and rights characterisation and interpretation over time, and to the need to consider the Court’s cumulative jurisprudence. As Löhmus aptly suggests in her Conclusion (p. 215), rights are important but their content is not self-evident and they need not reflect a culture of atomistic self-concern which divorces us from nature, society, and one another. Nor, I might add, should the pre-eminence and persuasive power of rights dissuade us from thinking (more) deeply about duties and whether

³⁶ *Ibid*, 2051-2053.

³⁷ J Mazzone, ‘When Courts Speak: Social Capital and Law’s Expressive Function’ (1999) 49 *Syracuse Law Rev* 1036.

³⁸ Such is claimed by L Helfer and A Slaughter, ‘Toward a Theory of Effective Supranational Adjudication’ (1997) 107 *Yale LJ* 273, and A Moravcsik, ‘The Origins of Human Rights Regimes: Democratic Delegation in Post-War Europe’ (2000) 54 *Int Org* 217.

a Universal Declaration (or European Convention) on Duties and Responsibilities is needed. *Caring Autonomy* is an effort to undertake some of the questioning around the interpretation and expressiveness exhibited by the ECtHR, demonstrating in the process that prevailing understandings of rights, or concepts like autonomy, are neither inevitable nor necessarily optimal from the stance of recognising the social cohesion that is necessary to our lived reality, and Löhmus helpfully offers an alternative path in respect of Article 8.

All told, and despite my preference for a stronger defence of the foundational premise (which I nonetheless soundly endorse), *Caring Autonomy* is an informative and insightful book, and an interesting and engaging read which will be relevant to anyone interested in the judicial interpretive function, in human rights and medical law jurisprudence, or in the application and possibilities of Article 8 for the development of rights in the face of increasingly enabling medical technologies. In fact, its sustained examination of autonomy in the medical context as against a caring ethic, which itself has drawn increased interest in the aftermath of the Mid Staffordshire Scandal,³⁹ is the best and most interesting jurisprudence-grounded exploration of a legal principle that I have seen to date,⁴⁰ and a noteworthy contribution to the ECHR/ECtHR and European legal scholarship.

³⁹ See R Francis, *Report of the Mid Staffordshire NHS Foundation Trust Public Inquiry: Executive Summary* (London: The Stationery Office, 2013). With respect to interest, I would cite the popularity of ‘Compassionate Care and the Law’ a masters law course offered at the University of Edinburgh.

⁴⁰ In other contexts S Pattinson and others. (eds.), *Emerging Values in Health Care* (London: Jessica Kingsley, 2010), and C Foster, *Human Dignity in Bioethics and Law* (Oxford: Hart Publishing, 2011) are worthy of note. For disclosure purposes, I also acknowledge my own interest in the claiming and operationalisation of values: see the publications at n 12, and S Harmon, ‘The Significance of UNESCO’s Universal Declaration on the Human Genome and Human Rights’ (2005) 2:1 SCRIPTed 18-47.